

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a Reasonable)
and Timely Fashion, and Possible Steps) CC Docket 98-146
to Accelerate Such Deployment)
Pursuant to Section 706 of the)
Telecommunications Act of 1996)

REPLY COMMENTS OF MINDSPRING ENTERPRISES, INC.

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MindSpring Enterprises, Inc. ("MindSpring") hereby submits its reply to the comments of other parties concerning the Commission's Notice of Inquiry ("Notice" or "NOI") in the above-captioned proceeding, FCC 98-187 (released Aug. 7, 1998).

SUMMARY

As MindSpring explained in its initial comments in this proceeding, we are one of the nation's leading Internet Service Providers, with a particular focus on residential and small business customers. ^{1/} We and other ISPs have lead the explosion in commercial Internet services by creating easy and economical means

^{1/} See MindSpring Comments at 1. (Unless otherwise indicated, all references to comments of parties refer to their comments filed September 14, 1998, in response to the NOI.)

for customers to access the Net. We have been able to do so because, in today's circuit-switched narrowband world, end users can reach us easily on a dial-up basis over the only two-way local loop, the ILEC circuit-switched facility.

The challenge for the Commission is to preserve the benefits of this "Open Systems World" as new broadband, high speed packet-switched local connections are deployed to the nation's homes and offices. MindSpring strongly supports this change, and we agree that "always on" packet connections will be the primary local loop of the future.

Unfortunately, however, for at least the next five to seven years (and perhaps indefinitely) high speed connections to most homes and businesses will run over the wireline plant of the ILEC or cable operator. It is not even clear that ILECs and cable operators will be equally suited to deploy broadband in all areas. But in any event, the number of broadband loops to a premise will typically be none, one, or perhaps two.

As a result, there is a serious danger that loop owners will exercise their control of the "always on" local broadband line to restrict Internet-based competition. They may completely deny use to independent (i.e. non-last-mile-owning) ISPs. Or they may achieve the same practical result through discrimination against unaffiliated ISPs regarding the terms and conditions for use of the broadband local pipe. Either way, the end user effectively would be forced to use the loop owner's Internet access service.

The comments in this proceeding fall into essentially two categories. Non-last mile ISPs emphasize the importance of customer choice when it comes to Internet connectivity. They call for FCC policies that, in the words of Section 230(b) of the Telecom Act, “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.” 2/ This “vibrant competition” exists because consumers have not been held captive by their local loop company. They have been able to use their local loop to reach the Internet provider of choice.

Last mile owners take a different approach. These firms -- the established ILECs and cable companies -- seek the ability to favor their own affiliated ISPs in ways that would reduce Internet-based competition. This is not surprising. As MindSpring discussed in its comments, history demonstrates time and again that a last mile owner always will try to exploit its market power to reduce customer choice. However, as the telecom world is revolutionized by the Internet, the Commission must ensure that this new technology expands competition rather than constricts it. These matters are discussed further below

2/ 47 U.S.C. § 230(b).

I. END USERS MUST HAVE MAXIMUM CHOICE IN THEIR INTERNET SERVICE PROVIDER -- NOT BE LIMITED TO THEIR LAST MILE FACILITY VENDOR.

A. The Role of Non-Last Mile ISPs.

Many commenting ISPs discuss the importance of allowing end users to choose their own provider of Internet-based services. MindSpring strongly agrees. ISPs are the vanguard in the "deployment" of advanced telecommunications capability by bringing the Internet to the desk tops of all Americans, including residential consumers. As one coalition of ISPs states, "retail ISPs are on the front lines of stimulating demand" for advanced services. 3/

In its initial comments MindSpring explained in detail why low entry barriers and vigorous competition in the ISP market benefit the country. We discussed the obvious benefits of lower prices and more innovation that accrue from any competition. We discussed the particular need for competition in customer support in the area of Internet-based services. Consumers already require far more support to access the Internet from their PCs than they ever have for conventional switched telephony. Their support requirements will only increase as the Internet comes to connect more devices in the home and office, and provides connectivity for more and more communications-based services. Ongoing support will be particularly crucial for small businesses and individual consumers who lack their

3/ Retail Internet Service Providers Comments at 4; see Internet Service Providers' Consortium Comments at 1; Commercial Internet Exchange Association Comments at 17; Information Technology Association of America Comments at 12-13; Verio Comments at 2.

own IT experts. ISPs like MindSpring fill that need. 4/ Indeed, we are enhancing the value of the Internet for all by working to increase the number of consumers who connect to the web and use it to find information and engage in e-commerce.

Finally, MindSpring has noted the importance of ISP competition given the key editorial role that ISPs increasingly play as they help customers process information and reach content -- through the ISPs' choice of: (i) primary search engines, (ii) blocking and filtering tools (including the selection of default gateway features), (iii) preferential visibility to links for particular web sites, and (iv) provisioning of their own content. The nation has a strong interest in maintaining low entry barriers so that the local loop owner cannot exercise disproportionate power over such content matters, advancing its own editorial perspectives. 5/

These views are echoed by other ISPs who are actively expanding consumer choices. For example, the Internet Service Providers' Consortium emphasizes the role of independent ISPs in providing individualized attention to consumers and in bringing Internet access to smaller communities who might not otherwise be addressed. 6/ AOL notes how the Internet "is transforming the way people communicate, learn, recreate, socialize, do business and live," 7/ all thanks to the actions of ISPs to bring the Net to the public

4/ MindSpring Comments at 13-15. MindSpring was named the ISP with the best customer support by *PC World* magazine in December 1997.

5/ MindSpring Comments at 15-17

6/ Internet Service Providers' Consortium Comments at 2.

7/ AOL Comments at 5.

B. The Competition Mandate of Section 706.

MindSpring explained in its comments why, as “always on” broadband access replaces dial-up, Section 706 requires the Commission to preserve an “Open Systems World” in which consumers can freely choose their ISP, and entry barriers are low. We agree with PSINET, Inc. that the Commission should look to the “robust competition and enormous innovation of the Internet as a model of what Section 706 should achieve.” 8/

Indeed, competition lies at the core of Section 706. That provision directly links the deployment of advanced telecommunications capability with the importance of ensuring that such capability advances competitive choice for consumers. 9/ “Advanced telecommunications capability” itself is defined as capability that “enables users to originate and receive high-quality voice, data, graphics, and video telecommunications.” 10/ Thus, the very purpose of Section 706 is to create an environment in which end users (not last mile loop owners) can decide for themselves what applications and what vendors they will access over the next generation telecommunications network.

8/ PSINET Comments at 9.

9/ For example, the Act asks the Commission to accelerate deployment of advanced telecommunications capability to “all” Americans “by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” Pub. L. 104-104, Title VII § 706(b)(emphasis added), 110 Stat. 153, reproduced in notes under 47 U.S.C. § 157 (hereafter cited as § 706).

10/ Id., § 706(c)(1) (emphasis added).

Put another way, the Commission is not doing its job if it allows the physical deployment of broadband last mile network to reduce the number of advanced service offerings available to consumers on competitive terms. Today consumers have multiple ISP options with respect to price point, service and support, and content. There is no reason why that competition cannot continue in the future as broadband last mile networks are deployed. ISPs like MindSpring are waiting impatiently to purchase "always on" connectivity to customers. We can continue to be the leaders in developing consumer understanding, acceptance and use of Internet-based services as they evolve to broadband. But advanced telecommunications deployment will be retarded if last mile owners are left free to dominate the Internet through their control of the broadband loop. Common experience shows that without competition, the choices available to consumers would improve very slowly, if at all.

This truism is all the more apt here, where the Internet threatens to cannibalize the core businesses of both the ILEC and the cable company as it supplants conventional networks as the path over which Americans communicate and obtain information. The comments here underscore that ILECs and cable companies are in by far the best position to deploy last mile physical networks. 11/ But they also reinforce the fact that ILECs and cable companies may continue to be slow to do so, and in particular be more slow to deploy advanced Internet-based services that improve upon conventional telephony and cable program delivery. In

11/ Even the ILECs and cable companies themselves point primarily to each others' networks as evidence of last mile "competition."

short, the comments of ISPs reinforce the need for "Open Systems" in order to meet the mandate of Section 706.

C. "Open System" Policies Should Apply to All Last Mile Owners.

A number of ISPs focus their initial comments on the risk of anticompetitive behavior by the ILECs. ^{12/} MindSpring certainly agrees that this is a serious problem, so serious that consideration of full divestiture of the ILEC last mile is the appropriate remedy. We have discussed this matter further in response to the related Notice of Proposed Rulemaking concerning ILEC provision of advanced services. ^{13/} There we explained why the Commission's proposal flounders by drawing the separation line in the wrong place - based on new vs. old services rather than last mile vs. non-last mile activity. And, while we presented steps that would strengthen structural separation, we also emphasized that complete divestiture of the last mile is the only practical and truly effective means of unlocking the full power of advanced services over the ILEC last mile. ^{14/}

All that said, we emphasize that it is not sufficient to focus on the ILEC alone. The cable television infrastructure will be a primary, and in many cases the primary, broadband last mile facility. This is particularly true with respect

^{12/} See, e.g., Retail Internet Service Providers Comments at 3; Internet Service Providers' Consortium Comments at 4.

^{13/} Deployment of Wireline Services Offering Advanced Telecommunication Capability Order and Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188 (Aug. 7, 1998) ("ILEC Advanced Services Order").

^{14/} See MindSpring Comments in Docket No. 98-147 (filed September 25, 1998).

residential customers. In our experience cable facilities provide the main path for two-way broadband connectivity to residential customers. So far this year, for example, 19 times more customers leaving MindSpring's service have identified "change to cable modem" as the reason, as opposed to "change to xDSL." ^{15/}

Not surprisingly, both the ILECs and the cable industry try to suggest that other last mile facilities are coming. There are two responses to such assertions. First, they are incorrect factually, especially outside the high volume business market. In the same "customer loss" surveys noted above, no high speed alternatives besides cable and ILEC xDSL register at all, emphasizing the absence of satellite or other wireless technologies as competitively relevant today. Nor will we see more broadband loop competition soon. MindSpring has actively investigated wireless and other last mile options. The unfortunate truth is that none of these technologies are close to offering a viable broadband, two-way path for advanced services. Some of them depend upon a dial-up return path that by definition fails to meet requirements for two-way broadband and "always on" service applications. Wireless may meet certain specialized needs today, and the technology may improve in the future. But at least for the next five to ten years it will not be competitive with wireline facilities. ^{16/} This is particularly true with respect to the residential and small business market.

^{15/} See AOL Comments at 9-11.

^{16/} MindSpring Comments at 23-26

Second, and in any event, it is almost irrelevant whether a particular premise is served by one broadband loop, or two, or eventually another. The ISP choices available to a consumer must always be far greater than the number of physical last mile loops available to the customer's premise. MindSpring certainly hopes that in the future consumers will be able to choose among more than one or two local broadband last mile facilities based on price, reliability and similar factors. But last mile network construction and operation is an entirely different business from the provision of services to consumers using the connectivity of the last mile. Network operations require different skills and have vastly larger capital requirements. Sections 230(b) and 706, with their emphasis on competition, direct the Commission to ensure that the high entry barriers to the last mile network operations business do not also stand as entry barriers to the ISP market. 17/ To maintain the "vigorous" Internet based competition of today, consumers must be able to reach multiple ISPs no matter how many -- or in fact how few -- last mile facilities options they have.

II. THE COMMISSION MUST REJECT ILEC REQUESTS FOR DEREGULATION.

The ILEC comments in this proceeding add nothing new to the Commission's records, and therefore can be dealt with quickly here. The ILECs complain that

17/ In the same vein, the Commission cannot require an ISP to become a CLEC in order to reach its customers. As we have noted elsewhere, the skills necessary to act as an ISP are not the same as those required to assemble and manage a local facilities network. See id. at 31.

they need to be deregulated in order to have incentives to upgrade their last mile network, and they complain about excessive burdens on them from the common carrier obligations that now exist. 18/ However, these complaints are a rehash of arguments that the ILECs made earlier this year, and that the Commission rejected in the ILEC Advanced Services Order. In that Order the Commission properly concluded that new ILEC network investment and data services are fully within the scope of Section 251 of the Telecommunications Act. 19/ The Commission's Order reflects the recognition that the last mile market power of the ILECs presents a serious threat to the ability of competitors to provide services, whether narrowband or broadband. 20/

Despite these firm and sound conclusions, the ILECs persist in complaining about the Telecom Act's requirement that they make their local network facilities available on non-discriminatory terms to competitors. They raise the specter that they will not invest in broadband networks if they are not allowed to exploit that investment on an exclusive basis. And they argue that deregulation is appropriate because of competition that they face from other directions.

MindSpring already has discussed the last mile role of the ILECs in its previous comments here, 21/ as well as in response to the Commission's proposal to

18/ See, e.g., BellSouth Comments at 42-56; Ameritech Comments at 9-16; Bell Atlantic Comments at 10-14; GTE Comments at 19-26.

19/ ILEC Advanced Services Order, supra, at ¶¶ 32, 41, 47.

20/ See id. at ¶¶ 21, 32.

21/ MindSpring Comments at 17-18.

excuse the ILEC's broadband activity from Section 251 and other regulatory obligations if they adopt limited structural separation. We will not repeat that discussion here, but ask that our comments in the Advanced Services Rulemaking be incorporated by reference. 22/

However, a few brief remarks are in order. First, we strongly support the comments of the many other parties who describe the market power of the ILECs, give examples of how the ILECs have exploited that power to block broadband and other services in the past, and discuss how the ILECs could do so in the future. 23/ Indeed, if there is one issue that unites the non-ILEC parties, it is the competitive danger that the ILECs present to future deployment of advanced telecom services on a competitive basis. MindSpring's decision not to expand on the extensive record on this point only is reflective of our view that this record already is compelling as it stands. We are focusing more attention here on the other last mile owner, the incumbent cable operator. However, we do so primarily because we do not think that the cable last mile issue has received sufficient attention, and because the issue is central to competitive choice for the residential market in particular.

Second, MindSpring strongly rejects ILEC arguments that they require deregulation in order to have incentives to build broadband last mile network. 24/

22/ MindSpring Comments in CC Docket No. 98-147 (filed Sept. 25, 1998).

23/ See, e.g., MCI WorldCom Comments at 3-4; Qwest Comments at 17-23; DSL Access Telecommunications Alliance Comments at 3-9.

24/ See, e.g., Ameritech Comments at 9-16; USTA Comments at 2-3.

We are certainly eager to have broadband connectivity to purchase. It is at least as likely that the ILECs are moving slowly out of their own inertia coupled with a reluctance to deploy new technologies that threaten their existing plant and services. The ILECs have a strong market-based reason to respond to that demand; they do not have to be given the ability to exploit their monopoly power as an additional incentive. In any event, if one takes at face value the ILECs' arguments regarding the last mile competition they claim to face, then one can assume that the ILECs will build to respond to that competition without further incentives.

Third, boiled down the ILECs can only point to cable as a potential last mile loop competitor, particularly in the residential market. Yet cable does not currently provide a means for consumers to access an ISP of choice. The ILECs therefore cannot offer cable up as a reason for their own deregulation. MindSpring discusses the cable issue in more detail below. But for present purposes, we emphasize that cable broadband is hardly a justification for ILEC deregulation. While we are sympathetic to ILEC arguments for more symmetry in the obligations of last mile owners, the answer is to ensure that consumers can reach the ISP of their choice no matter whether their broadband loop is copper or cable. "Open Systems" are required in both cases, not, as the ILECs apparently argue, in neither.

III. CABLE OPERATORS MUST PROVIDE NON-DISCRIMINATORY TRANSPORT TO ALL ISPS.

A. Cable Customers Deserve ISP Choice.

For the reasons stated above, MindSpring strongly agrees with those parties who emphasize the need for consumer choice over the evolving cable broadband platform. ^{25/} The comments here demonstrate that cable companies have a substantial headstart and an on-going advantage in deploying broadband to the residential market due to the technological advantages of HFC plant. ^{26/} The Commission must ensure that consumers are not forced to subscribe to the cable company's affiliated ISP in order to reach the Internet.

We can predict that cable companies will argue that they will not block consumers from reaching any particular web site, including the web site of a competing ISP. But this misses the point. As AOL remarks, "[c]onsumers should not have to purchase two ISP services to get the one service they want." ^{27/} Recall the benefits of ISP competition in the areas of (i) pricing and service innovation; (ii) customer support; and (iii) information diversity. ^{28/} Each of these benefits

^{25/} See, e.g., AOL Comments at 9; Circuit City Stores Comments at 13.

^{26/} See, e.g., BellSouth Comments, Exhibit A. Cable operators themselves brag that they are rapidly deploying broadband local networks. See, e.g., National Cable Television Association Comments at 2-13. It should be obvious that cable operators also derive market power from their pre-existing relationships with a substantial majority of the residential customers in their service areas, including virtually all customers who now or in the future will desire ISP services.

^{27/} AOL Comments, Executive Summary at 1.

^{28/} See Section I, *infra*.

would be undone if cable operators do not provide direct connectivity to ISP competitors.

First, by definition consumers would be artificially forced to pay more. They would pay to reach the cable ISP, and they would have to pay again to reach their ISP of choice.

Second, customer support competition would be eliminated because consumers would be captive to the support levels of their cable company. MindSpring would suggest that, given the past service records of the cable industry, consumers should not be forced to rely on cable operators to help them connect both their PCs and later other home and business equipment to the Internet.

Third, the mere fact that a consumer can reach alternative web pages does not eliminate the editorial power that the cable company would enjoy through its promotion of its own content and advertisers at the gateway, or through its choice of default browsers and blocking technologies. MindSpring is certainly not advocating the regulation of such editorial decisions. But we do not think Americans should be forced to visit their cable company home page every time they connect to the web, or be required to undo the defaults selected by the cable operator. Consumers must be able to choose an alternative ISP instead.

This is certainly possible as a technical matter. For example, MindSpring has recently entered into an agreement with a competitive cable company that could serve as a model. MindSpring interconnects with a router at the cable headend, and the cable operator transports data packets over its HFC

network to and from our customer's premise. MindSpring supplies and installs customer premises equipment and provides other end user Internet support. We pay the cable operator to connect to their router on a per customer basis. Significantly, this arrangement is non-exclusive many other ISPs can connect with the cable system and compete with us, just as we compete with the ISP affiliated with the cable operator ourselves.

Unfortunately, experience suggests that incumbent cable operators are not willing to agree to similar arrangements, and instead want to preserve an exclusive position for a single ISP. This may be an ISP directly affiliated with the cable operator. Alternatively, the cable operator may exploit its dominant position by forcing an ISP to pay excessive rates for last mile transport, albeit on an exclusive basis. The result for consumers is the same either way. They are denied competitive choice.

B. The Commission Should Reject Cable Arguments for Denying Transport to Other ISPs.

Cable operators raise a number of arguments to justify why their customers should be required to access Internet services only through the operator-affiliated ISP. None of them have merit.

1. The Broadband Last Mile Is Not Competitive.

Not surprisingly, cable operators like ILECs try to pretend that the last mile network is or soon will be competitive. On any close examination, however, it is readily apparent that this is more smoke than fire. For example,

NCTA inevitably points to RBOC projections of xDSL deployment. However, these projections are relevant only if at least three facts are true: First, xDSL technology must prove its ability to compete fully with broadband service over HFC plant. This question is very much uncertain given the technical limitations of copper plant and the work that will be needed to prepare that plant for digital service. Second, RBOCs must actually deploy xDSL effectively and ubiquitously. Third, and most important, RBOCs must provide that last mile broadband connectivity to unaffiliated ISPs on reasonable terms and conditions such that consumers who do not want either the cable ISP or the ILEC ISP can have a real choice.

Even if all of these facts were present, MindSpring would still argue that cable operators should not be excused from offering non-discriminatory transport to ISPs. As some parties have noted, consumers will benefit from the maximum competition among last mile facilities vendors. Consumers should be able to choose their last mile network separate and unbundled from their Internet service so that they have maximum choice in both of these distinct lines of business. 29/ For example, a customer who prefers MindSpring's ISP prices, services and support should be able to decide for itself whether to access MindSpring over xDSL or HFC network. The customer should not be forced into a position where it must either buy an xDSL loop or lose the ability to choose MindSpring due to cable operator non-cooperation. In any event, however, the nation is not yet even close to the point where consumers typically have two

29/ See AOL Comments at 11.

broadband loop options, so we have not reached the point where this question is relevant.

Cable operators try to point to other broadband loop deployment, but none of it undercuts the need for policies to preserve consumer ISP choice. For example, NCTA points to “start-up” CLECs, disregarding both the focus of those firms on the high-end business market, and their limited geographic reach. ^{30/} The Association also points to backbone fiber deployment by interexchange companies, disregarding the irrelevance of that backbone to the last mile. ^{31/} MindSpring fully agrees that the backbone market is competitive and booming; the problem for ISPs and all competitors is in getting to the customer location. Finally, the NCTA points to various terrestrial and satellite wireless technologies. As MindSpring notes above, however, its investigation of these services has found that none of them can begin to compete with wireline with respect to the provision of two-way, always on broadband capacity. ^{32/}

The Commission must look past hype and vaporware and watch what is really happening in the marketplace. If it does so, it will understand that for the foreseeable future cable operators will have at least as much market power as ILECs over the broadband last mile, and must be equally responsible for making that last mile available to unaffiliated parties on non-discriminatory terms.

^{30/} NCTA Comments at 14-17.

^{31/} *Id.* at 17.

^{32/} See Section I.C., *infra*.

2. Cable Plans to Create Proprietary Content Are Additional Reasons to Ensure That "Open System" Principles Apply to Cable Loops.

Cablevision Systems Corp. raises an additional argument. It notes that it is developing proprietary broadband content and implies that this fact supports its claim of a right to deny other ISPs access to its broadband networks. 33/

However, just the opposite is true. Cablevision's intentions in this area underscore the threat to information diversity that we have noted above and in our original comments. MindSpring has no objection to Cablevision's development of content. What we do oppose is a system in which end users must use a Cablevision ISP, and must first access Cablevision content, in order to reach any other information or editorial point of view. The answer is to require "Open Systems" and then let the market decide the merits of the content that Cablevision offers.

MindSpring would also observe that "Open Systems" will increase the value of all Internet content investments, including those of content providers that are not affiliated with either last mile owners or ISPs at large. We have discussed the vital role that we and other ISPs have played in educating consumers to the Internet and helping them learn to use the Web. It is not an exaggeration for us to say that the explosion in Internet information and commerce has been driven by ISP efforts to help millions of consumers link themselves to those content sources,

33/ Cablevision Comments at 3-4.

consumers who might otherwise find the Internet too complicated and intimidating. We will do the same in the future if the last mile remains open. In the broadest sense, then, preserving Open Systems enhances the investments of all Internet content providers, including those of Cablevision, by increasing the potential audience for that content.

3. “Open System” Policies Will Promote Investment.

Another recurring theme of the cable operators is that “Open System” policies will reduce incentives for broadband investment. ^{34/} Yet they provide no evidence as to why this should be so, particularly given their claims that the market is competitive. If last mile broadband were in fact competitive, then cable operators would have no objection to selling capacity to competitive ISPs in order to get profitable traffic and revenues on to their own networks instead of those of their “competitors.”

The Commission should keep its eye on the enormous pent-up demand from ISPs like MindSpring and our customers for “always on” broadband connectivity. We are eager to purchase such connectivity so that we can enhance our current Internet-based offerings and move on to bring customers new applications that will become possible with broadband, including new applications that have not even been invented but that can be expected to arrive quickly if competitive market forces are kept unleashed through “Open Systems.”

^{34/} See, e.g., NCTA Comments at 23-25

In short, there should be every reason for cable operators to upgrade their networks for a large market that is waiting to compensate them for doing so. That upgrade process has begun. The real issue is how to ensure that “always on” broadband loops permit consumers to reach a wide universe of ISPs, and not just the cable operator’s affiliate.

4. The Commission Has The Legal Authority to Require Cable Operators to Offer Last Mile Transport Services.

The cable industry’s ultimate argument is in fact a legalistic one. At the end of the day they fall back on an argument that whether or not they should offer “Open Systems,” they cannot be required to do so. ^{35/}

This argument rests on a unjustified scrambling of the line between (i) telecommunications transport and (ii) the provision of services over that transport. MindSpring agrees that Internet access service itself is not a basic telecommunications service, and we are not arguing that a cable-affiliated ISP should be so regulated. However, a different question is raised by the last mile transport that is used by a cable ISP service and that would be used by any other ISP. We strongly agree with other parties that such last mile transport of data packets between an end user and the ISP is “telecommunications.” It follows that

^{35/} See, e.g., NCTA Comments at 20-29.

such telecommunications should be offered on an unbundled basis from the cable company's ISP service. 36/

Cable interests attempt to evade this common sense conclusion by arguing that cable Internet activities meet the definition of "cable services" that are regulated by Title VI of the Communications Act rather than Title II. They point to the addition of the words "or use" to that definition in the Telecom Act. 37/ However, this argument is absurd. The definition simply states that "cable service" is "the one-way transmission to subscribers of video programming or other programming service, and subscriber interaction, if any which is required for the selection or use of such video programming or other programming service." Internet access is two-way, not one-way, and it is not a programming service. And beyond that, the transport of data packets between a customer location and an ISP is certainly not one-way and it is not the provision of a programming service. It is the provision of basic telecommunications which must be offered separately by both ILECs and any other local telecommunications service provider.

MindSpring emphasizes that it is not arguing for regulation of any ISP activities, including those of the cable company or any affiliate. We agree that such services should not be regulated whether they are categorized as enhanced services or information services. But that is a completely different question from how to

36/ See, e.g., Circuit City Comments at 9 (Commission should unbundle basic data transmission from enhanced segment of cable offerings).

37/ See, e.g., AT&T Comments at 37-38; accord, NCTA Comments at 22-23.

treat telecommunications transmission over the cable last mile, whether that activity is the transport of circuit-switched voice or the transport of packet-switched data.

CONCLUSION

The comments in this proceeding underscore the need for Open Systems that will preserve for consumers the vigorous competition in the Internet market today. As the local network evolves to "always on" broadband, "dial-up" access no longer will be an adequate means for consumers to side-step the market power of the loop owner. It therefore will be the duty of the Commission to ensure that neither ILECs nor cable operators are able to exploit their unique position as